# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1146

AMERICAN ART INDUSTRIES, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by coercively interrogating its employees about the General Sales Drivers and Allied Employees, Local 198, IBT, during the course of an organizational campaign, by threatening to close its plant if a union came in, by promising benefits to undermine the Union's organizational drive, and by threatening to discharge any employee who joined a strike against the Company

(R. 42).[1] The Board also found that the Company violated Section 8(a)(3), by discharging four employees because of their activities on behalf of the Union, and Section 8(a)(4), by discharging two employees for testifying at a Board hearing (*ibid.*). Finally, the Board found that the Union had obtained valid authorization cards from a majority of the employees in an appropriate unit at a time when it sought recognition and bargaining (R. 37-39); that petitioner's refusal to bargain with the Union was not in good faith (R. 39); and that petitioner's refusal thus violated Section 8(a)(5) of the Act (R. 41-42; Pet. App. 43).

The Board ordered petitioner to cease and desist from the unfair labor practices found (R. 44-45, 63); to reinstate striking employees upon application and grant them backpay where appropriate, including the four employees discharged in violation of Section 8(a)(3) (R. 42-43; Pet. App. 43-44); to reinstate with backpay the employees discharged in violation of Section 8(a)(4) (R. 42; Pet. App. 46); and to bargain, upon request, with the Union (R. 44).

The court of appeals sustained the Board's findings and conclusions, and enforced its order in regard to the violations of Section 8(a)(1), (3), and (4) of the Act (Pet. App. 8-9). Although the court also sustained the Board's finding that the Union possessed valid authorization cards from a majority of the employees in an appropriate unit when it

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[1] "R." references are to the appendix to the parties' briefs in the court below.

sought recognition and bargaining, it remanded the Section 8(a)(5) issues to the Board for reconsideration in light of this Court's decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 (Pet. App. 14-15).

Petitioner principally challenges the factual predicate for the Section 8(a)(5) finding.[2] It contends that English language authorization cards signed by Spanish-speaking employees could not be used to prove the Union's majority status; that the Company was improperly denied the right to produce evidence relating to the size of the appropriate unit; and that it was prejudiced by other evidentiary rulings of the Trial Examiner. These are all factual issues (see Pet. App. 9-14) which even if ripe would not warrant further review. But here the petition is premature. The court of appeals remanded the refusal-to-bargain portion of the case to the Board for reconsideration. Although the Board has since reaffirmed its Section 8(a)(5) finding and its bargaining order remedy,[3] that decision will not be ripe for review by this Court until

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[2] Petitioner's statement of questions involved (Pet. 5-6) and the bulk of its argument relate only to the Section 8(a)(5) violation. At one point, however, petitioner states (Pet. 11): "It is the propriety of the enforcement of the alleged 8(a)(1), (3) and (4) violations *and the remand* which are the issues upon which the Petitioner seeks a writ of certiorari" (emphasis in the original). The sole discussion of these violations relates to the alleged lack of evidentiary support for the Section 8(a)(4) violation (Pet. 23-24)—an issue which does not warrant further review.

[3] The Board's supplemental decision and order were issued on December 5, 1969, 179 NLRB No. 162.

the court of appeals has considered it and, if it sustains the Board, has entered a supplemental decree enforcing the bargaining order.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1970.

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